United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

735

BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20079

JOSEPH M. STONE, EXECUTOR OF THE WILL OF ELNA H. WHARTON, DECEASED, *Appellant*,

v.

AGNES WHARTON BREWSTER, *Appellee*.

Appeal from the District of Columbia Court of Appeals

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

STATEMENT OF QUESTION PRESENTED

Should an Executor, in seeking to carry out the last wishes of his testatrix, an eighty-five year old widow, and to protect creditors who furnished financial assistance and services to the decedent who allegedly was in need of public assistance as a chronic invalid, be denied the right to prosecute the appeal of an action brought by his testatrix against her adult daughter (whose unencumbered family income exceeds $50,000 annually) under the Assistance Act of 1962, for the sole reason that the testatrix died pending appeal and the statute is to be regarded as "prospective" in its operation?

TABLE OF CONTENTS

CITATIONS

CASES:

STATUTES:

District of Columbia Code

* Cases chiefly relied upon.

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Appeal from the District of Columbia Court of Appeals

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from an order of the District of Columbia Court of Appeals entered on March 24, 1966 dismissing the appellant's appeal on the ground that the death of the testatrix (for whom the instant appellant is Executor) ended the action. The jurisdiction of this Court is invoked under Title 11, Section 773 District of Columbia

Code, 1961 Edition, pursuant to which, on appellant's petition for allowance of an appeal to this Court, an order was granted by this Court on June 3, 1966 allowing this appeal.

Jurisdiction of this cause below was based on Chapter 3, Section 218(a), District of Columbia Code, Supp. V, 1966, 1961 Ed.

STATEMENT OF THE CASE

The District of Columbia Assistance Act of 1962 amended the public assistance statutes of this jurisdiction to provide that an "adult child" of a parent "in need" of public assistance shall "according to his ability to pay . . . be responsible for the support of such person." Section 3-218(a), D. C. Code, Supp. V, 1966, 1961 Ed. In this suit, a mother, appellant's testatrix, invoked the Assistance Act of 1962 and, alleging the requisite need, sought the relief specified in the statute—namely, "such sum or sums of money in such installments as the court in its discretion may direct . . . enforced in the same manner as orders for alimony." *Ibid.*[1]

Appellant's testatrix was an 84 year old widow who had resided in the District of Columbia for over 45 years at the time she brought suit on December 3, 1964 against her eldest daughter, appellee herein, for support payments (R. 17). The testatrix had relinquished her completely independent existence and living arrangements at age 82, after being compelled to do so by a chronic heart ailment requiring 24 hour nursing attendance, the expenses of which exhausted her assets (R. 19-20, 21, 23, 27-28, 29-30, 34, 65-68).

Appellee refused to advance any money toward her mother's upkeep, despite repeated requests that she begin

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[1] In the alternative, an action for such installment payments may be brought by the Commissioners of the District of Columbia on the parent's behalf. *Ibid.* Prior thereto, the Commissioners were empowered to bring suit only for *restitution* on the sole basis of *public assistance already provided* by the District of Columbia. Section 3-218(b), D. C. Code, Supp. V, 1966, 1961 Ed.

making support payments following the exhaustion of her mother's funds[2] (R. 25, 45). Appellee's yearly salary is $18,200 (R. 109, 110), that of her husband is $30,750, and their combined annual income is in excess of $50,000, with no dependents (R. 112-113).

After appellee's motion to dismiss the complaint (R. 132) was heard and denied on March 16, 1965, appellee filed an answer incorporating an affidavit (R. 148) offering assistance on condition that the testatrix be surrendered to her custody and appellee "determine" both the "nature and place" of her mother's "care" (R. 137, 149-150).

The trial judge found that the testatrix needed assistance (R. 124-125) but denied monetary relief and dismissed the complaint, leaving the testatrix the alternative of transferring to appellee's home as appellee proposed at the trial (R. 124-126, 162-165). This, the testatrix refused to do on the ground that any such "forced transfer" would "permanently impair her health and hasten her death" (R. 158), and she urged reconsideration of her "physical and psychological need . . . to remain in her present surroundings" (R. 158).

Against an adverse order entered on April 29, 1965 (R. 159-161, 166-167), the testatrix filed an appeal on May 6, 1965 (R. 169), but died on August 13, 1965, during the pendency of the appeal.[3] Ten weeks later, following the

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[2] The monthly expenses required by testatrix's medical needs were four times her monthly income of $203 (from a government retiree's pension and social security stipend). To assist in meeting these expenses, her younger daughter depleted her own resources (R. 15, 24-25, 26-27, 28, 30-31, 56, 58-61).

[3] Among her grounds for appeal, testatrix urged: (1) that the trial court had exceeded its statutory jurisdiction by purporting to exercise continuing jurisdiction over the testatrix's person and inherent personal rights as in child custody cases; and (2) by opening the way to testatrix's involuntary surrender to appellee's custody, the trial court disregarded testatrix's fundamental rights as guaranteed by the civil commitment procedures in Title 21 of the District of Columbia Code (1961 Ed.).

filing of appellant's brief on the merits, appellee on October 29, 1965, filed a motion to dismiss appellant's appeal as moot (R. 185-194). The District of Columbia Court of Appeals, by an opinion entered on March 24, 1966 (R. 241), dismissed the appeal, holding in pertinent part that (R. 241):

> "When the mother died the action was ended, and therefore no order may now be entered for her support. At common law there was no duty on an adult child to support his parent, and our statute does not ipso facto place such an obligation on the child. The statutory obligation does not arise until the court first determines the parent's need for support, the child's ability to furnish such support, and the extent to which such support should be furnished."

The court also ruled (R. 241):

> "Since we hold that the statute is prospective only in its operation and effect, and that any right the mother had under the statute ceased to exist at her death, we need not consider the question of survival of such a statutory cause of action under D. C. Code 1961, § 12-101 (Supp. V, 1966)."

This Court granted appellant's petition for allowance of an appeal from the dismissal order of the District of Columbia Court of Appeals.

STATUTES INVOLVED

District of Columbia Code, Supplement V, 1966, 1961 Ed.

"Section 3-218. Responsible relatives.

"(a) The husband, wife, father, mother, or adult child of a recipient of public assistance, or of a person in need thereof, shall, according to his ability to pay, be responsible for the support of such person. Any such recipient of public assistance or person in need thereof or the Commissioners may bring an action to require such husband, wife, father, mother, or adult child to provide such support and the court shall have the power to make orders

requiring such husband, wife, father, mother, or adult child to pay to such recipient of public assistance or to such person in need thereof such sum or sums of money in such installments as the court in its discretion may direct and such orders may be enforced in the same manner as orders for alimony.

"(b) The Commissioners shall be empowered on behalf of the District to sue such husband, wife, father, mother, or adult child for the amount of public assistance granted under this chapter or under any Act repealed by this chapter to such recipient or for so much thereof as such husband, wife, father, mother, or adult child is reasonably able to pay.

"(c) All suits, actions, and court proceedings under this section shall be brought in the domestic relations branch of the municipal court for the District of Columbia. To the extent applicable, the provisions of sections 11-758 to 11-770 shall be followed in suits, actions, and proceedings brought pursuant to this section. (Oct. 15, 1962, 76 Stat. 918, Pub. L. 87-807, § 19.)"

District of Columbia Code, 1961 Ed.

"Section 12-101.

"On the death of any person in whose favor or against whom a right of action may have accrued for any cause prior to his death, said right of action shall survive in favor of or against the legal representative of the deceased: Provided, however, That in tort actions, the said right of action shall be limited to damages for physical injury except for pain and suffering resulting therefrom."

"Section 20-501. Suits by and against executors and administrators.

"Executors and administrators shall have full power and authority to commence and prosecute any personal action at law or in equity which the testator or intestate might have commenced and prosecuted: Provided, however, That in tort actions, the said right of action shall be limited to damages for personal injury except for pain and suffering resulting therefrom, ..."

STATEMENT OF POINTS

The lower court erred in holding that an eighty-five year old widow, who brought an action under the Assistance Act of 1962 nine months prior to her death on the ground that she was in need of public assistance as a chronic invalid, be denied recovery under the statute from her adult daughter, whose unencumbered family income exceeds $50,000 annually, for the sole reason that the mother died pending appeal and the statute is to be regarded as "prospective" in its operation.

SUMMARY OF ARGUMENT

In narrowly holding that a child's obligation to aid a parent only arises upon final adjudication resulting in a specific money award to a living plaintiff, the court below not only subverted the Congressional design to afford relief and assistance to the aged and needy but also afforded a means to blunt and defeat the application of the statute to appellant's testatrix and others similarly situated.

The decision of the court below is inconsistent with the rationale of this Court's decision in *Beach v. Government of the District of Columbia*, 116 App. D.C. 68, 320 F. 2d 790 (1963), in which this Court affirmed the fundamental concept on which the statute here involved rests—namely, the imposition of statutory responsibility "in terms of 'ability to pay' " (116 App. D.C. at 71, fn. 5, 320 F. 2d at 793) upon relatives of close consanguinity, to whom "the law turns . . . for relief" because the "support of the poor is a public duty, and, in case of the default of him upon whom is imposed a prior duty to afford such support, the cost of providing the same will be on the body politic." 116 App. D.C. at 71, 320 F. 2d 793, citing with approval *People* v. *Hill*, 163 Ill. 186, 46 N.E. 796 (1896).

For the older person who is chronically ill, each passing day imposes its own cruelties, and time becomes an ever-tightening vise. The decision below—while that is not, of

course, its design—operates to blunt the humanitarian purposes of the statute. Moreover, it places a valuable premium on evasion and discourages voluntary compliance by rewarding recalcitrants who may seek to take refuge in the possibilities for delay that may arise once court action is instituted.

The decision below is at odds with an unbroken line of authority in this jurisdiction which is of uniform effect in applying the Survival Act of the District of Columbia (Sec. 12-101, D.C. Code, 1961 Ed.). These cases are apposite and apart from all else are decisive of the issue here presented. E.g.: *Hudson* v. *Lazarus,* 95 App. D.C. 16, 217 F. 2d 344.

ARGUMENT

We believe that the construction placed by the court below upon the Assistance Act of 1962 is untenable as contrary to the intent of Congress. Despite the accepted principle of statutory construction that remedial statutes are not to be construed narrowly, the court below ruled that the statutory obligation does not arise until "there has first been an action brought resulting in an adjudication by the Court including a specific money award." This decision, appellant submits, places the statute in permanent jeopardy and inhibits its use except by the most hardy. Indeed, it places a premium on false promises, dilatory tactics and other stratagems before the filing, and during the pendency, of suit since "victory" will belong to the living who may well not be the just.

A few years ago, when this Court had occasion to decide *Beach* v. *Government of the District of Columbia,* only the constituted officials of the District of Columbia, as we have indicated, were empowered to resort to court action for recovery from the financially able relatives, of public funds expended for the care and maintenance of their

relatives (*supra*, fn.[1]). 116 App. D.C. 68, 320 F. 2d 790 (1963); cert. den. 375 U.S. 943, 84 S. Ct. 351.

However, the *Beach* case provides the logical frame of reference for our argument. While, of course, factually distinguishable and in nowise to be deemed dispositive of the circumstances and the issue here, it established express affirmance by this Court of the fundamental doctrine on which the instant statute rests—namely, the imposition of statutory responsibility "in terms of 'ability to pay'" (116 App. D.C. at 71, fn. 5, 320 F. 2d at 793) upon relatives of close consanguinity, to whom "the law turns . . . for relief" because the "support of the poor is a public duty, and, in case of the default of him upon whom is imposed a prior duty to afford such support, the cost of providing the same will be on the body politic."[4] 116 App. D.C. at 71, 320 F. 2d 793, citing with approval *People* v. *Hill*, 163 Ill. 186, 46 N.E. 796 (1896).

Thus, under controlling authority, which found the District of Columbia in conformity with the well-nigh universal pattern throughout the nation, the law was settled with respect to public recovery for the cost of an incompetent's maintenance in a public hospital (as in Section 21-586, Supp. V, 1966, D.C. Code, 1961 Ed.) or for public assistance "granted" anyone (as in Section 3-218(b) of the D. C. Code, *supra*).[5]

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[4] The Court—on the basis of what was then Section 21-318 (D. C. Code, 1961 Ed.)—affirmed the judgment obtained by the District of Columbia against the father of an adult daughter for the cost of treating her in a District institution. Accord: *Harris* v. *District of Columbia*, — App. D.C. —, 357 F. 2d 593 (March 4, 1966).

In his opinion, Judge Fahy traced the long history of the liability dating from the ancient Statute of Elizabeth, the purpose of which was then, as now, "to protect the public from loss occasioned by neglect of a moral duty imposed on individuals, and to do this by transforming the imperfect moral duty into a statutory and legal liability". 116 App. D.C. at 71, 320 F. 2d at 793.

[5] Currently, "Forty-two States, Puerto Rico and the District of Columbia", as the United States Supreme Court recently observed, "have similar statutes on their books . . .". *Department of Mental Hygiene of California* v. *Kirchner, Administratrix*, 380 U.S. 194, 201 (fn. 8) (decided March 8, 1965).

With this the pre-existing legislative pattern, Congress in 1962 took a long and important stride forward in the passage of the amendatory welfare legislation which governs the instant case. The significant shift of emphasis that characterizes the instant statute lies in the fact that it is *anticipatory*, focusing as it does upon the *primary responsibility* of designated close relatives to contribute *in the first instance* toward the support of their immediate family, on the basis of financial ability to do so.[6]

Thus, a direct pathway is established for reaching responsible relatives possessed of the requisite financial ability, relieving the public authorities of the burden, as in the *Beach* and *Harris* cases, of recouping funds previously expended, with all of the additional administrative and litigation burdens entailed. Consequently, the "protection of the public purse" (*Application of Rickey*, 126 N.Y.S. 2d 261, 262) looms large in the legislative design, calculated to prevent unnecessary inroads upon the welfare funds of the District of Columbia.[7]

The Assistance Act of 1962 was designed to aid the old,[8] the sick, the needy and the helpless. This Court may properly take judicial notice of the inherent difficulties that may confront a needy person of advanced age, required to

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[6] Under the circumstances of the *Beach* case, *supra*, where treatment for mental illness by a public facility was the overriding factor, the law placed only a "secondary responsibility" on the father when the estate of the incompetent was found insufficient to defray the costs.

[7] "Welfare In Review", the U. S. Department of Health, Education, and Welfare, March 1966, Vol. 4, No. 3, Chart following page 34.

[8] While the Act is not for the elderly alone, it is self-evident that they as a class are entitled to count heavily on its protection.

"There are 18 million older Americans—men and women aged 65 or over. This is 9.4 percent of the approximately 191 million people in the United States . . . Half of all senior citizens are now more than 72.6 years old. . . . the percentage of older persons with one or more 'chronic condition' is high—81% in 1961-63 . . ." "Statistics of Aging," *Background and provisions, The Older Americans Act*. U. S. Department of Health, Education, and Welfare, Administration on Aging, Washington, D. C., July 1965, pp. 6-7.

first engaged counsel and seek judicial enforcement of this statutory right.[9] In the present action, for example, appellant's testatrix, through counsel, first had to surmount the technical defenses interposed by appellee's initial motion to dismiss, heard separately in the trial court, as well as a subsequent challenge to the constitutionality of the statute, before even coming to grips with the case on its merits.

For the older person who is chronically ill, each passing day imposes its own cruelties, and time becomes an ever-tightening vise. The decision below—while that is not, of course, its design—operates to blunt the humanitarian purposes of the statute. Moreover, it places a valuable premium on evasion and discourages voluntary compliance by rewarding recalcitrants who may seek to take refuge in the possibilities for delay that may arise once court action is instituted.

Indeed, under the construction in question, the recalcitrant would have everything to gain and nothing to lose, since the statutory action would be defeated in the event the indigent plaintiff died at any time prior to a favorable decision in the trial court or, as here, the processing of the appeal to a final decision. In the case of the old, the actuarial tables would be heavily weighted upon the side of the financially responsible relatives who resist by forcing litigation, which they are, by the same token, far more able to sustain.[10]

The court below held that, under its disposition of the case, it was unnecessary "to discuss why relief was denied

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[9] Not to be discounted also is the inevitable emotional distress that must be endured by, for example, a parent who becomes an active litigant against an adult child, whatever the circumstances.

[10] For the foregoing reasons, it is no answer to say that the Commissioners of the District of Columbia may, in the alternative, bring suit. Additionally, this would require enhanced legal staff and budgetary expenditures, so that the process might prove self-defeating insofar as the statutory intendment is concerned.

or whether such denial was correct." (R. 241). If appellant's testatrix had survived, it would, of course, have been necessary to resolve this issue. Under the ruling below,[11] if the case had been reversed and remanded to the trial court, support payments would have awaited implementation by the trial court—many months after the filing of her appeal. Moreover, if appellee had filed a petition for allowance of appeal with this Court, the date on which the obligation would begin to accrue would have been postponed further.

This, we submit, is contrary to the statutory intendment and effective implementation of the Act. Such implementation plainly requires the adoption of the view that the obligation to the successful indigent-litigant arises at the latest (even under the most restricted construction) with the filing of the statutory action which, in the instant case, occurred nine months prior to her death.[12]

Finally, the court below held that "any right the mother had under the statute ceased to exist at her death" and therefore it "need not consider the question of survival of such a statutory cause of action under D. C. Code 1961 § 12-101 (Supp. V, 1966)" (R. 241). We respectfully submit that this formulation is, in effect, a holding that the action abated, and as such is at odds with the Survival Act of the District of Columbia (Sec. 12-101, *supra*), as upheld by a uniform line of cases decided by this Court. E.g.: *Hudson* v. *Lazarus*, 95 App. D.C. 16 at 18-20, 217 F. 2d 344. In the *Hudson* case, an action for personal in-

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11 The court held that the "statutory obligation" of adult children to support their destitute parents "does not arise until the court *first determines*" the need of the parent, the financial ability of the adult child, and the amount to be "furnished." (Emphasis supplied.)

12 Appellant's position is entirely consistent with the statement of the court below that "the statute contemplates present and future support." Appellant did not seek, and does not seek, retroactive payment, but rather the relief provided by the statute stemming from the time the claim was asserted.

juries sustained in an automobile collision, where the administratrix was substituted as a party following the plaintiff's death. Judge Edgerton adverted to the current version of Section 12-101, which is likewise applicable to the case at bar (217 F. 2d at 348):

> "The Survival Act of the District of Columbia provides: 'On the death of any person in whose favor or against whom a right of action may have accrued for any cause prior to his death, said right of action shall survive in favor of or against the legal representative of the deceased: *Provided, however,* That *in tort actions, the said right of action shall be limited to damages for physical injury except for pain and suffering resulting therefrom.*' D. C. Code 1951, § 12-101, 62 Stat. 487 . . . ." (Emphasis added by the court.)

Announcing that there was "no basis for an inference that Congress intended us, in these circumstances, to give less than full effect to the terms of the Survival Act" (217 F. 2d 349), the Court held that the decedent's disabilities after the accident entitled his legal representative to recover damages which included "an allowance for prospective loss of earnings during his normal life expectancy" as well as the value of medical and hospital services that had been furnished the decedent veteran by the Bethesda Naval Hospital without charge (217 F. 2d at 346-347). Accord: *Colpoys* v. *Foreman,* 82 App. D.C. 349, 163 F. 2d 908; *Sornborger* v. *District Dental Laboratory, Inc.,* 105 App. D.C. 292, 266 F. 2d 694.

Manifestly, the statutory "right of action" grounding the case at bar, "accrued" to appellant "prior to . . . death"; is not comprehended within the exceptions of the "tort actions" proviso to Section 12-101, *supra;* and hence falls squarely within the affirmative provisions of the Survival Act, as construed by the unbroken line of authority cited above.

CONCLUSION

The decision below should be reversed and the order granting the motion to dismiss vacated so that the appeal may be heard on its merits.

Respectfully submitted,

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BRIEF FOR APPELLEE

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Appeal From the District of Columbia Court of Appeals

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STATEMENT OF QUESTION PRESENTED

Whether the appeal of an action brought by a mother against one of her four adult children for support under the District of Columbia Public Assistance Act of 1962 may be maintained by the mother's estate where:

a. the mother died during the pendency of an appeal from the adverse judgment of the trial court;

b. the District of Columbia Court of Appeals held that the statute clearly contemplated present and future support and, therefore, that the mother's death terminated her action; and

c. the assistance contemplated by the statute gives rise to purely a personal right neither assignable nor subject to legal process.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

* Cases marked with asterisks chiefly relied upon.

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Appeal From the District of Columbia Court of Appeals

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The complaint of appellant's testatrix sought support from her appellee daughter, one of four adult children (R. 162), under D. C. Code § 3-218(a) (Supp. V, 1966) providing, *inter alia*, that a recipient of public assistance or a person in need thereof may bring an action for support against a responsible relative within the degrees of relationship therein specified, including an adult child. (R. 128).

Following the hearing, the trial court[1] entered an order dismissing the complaint finding in pertinent part as set forth in its Memorandum Opinion that:

> During trial respondent on the stand offered to furnish her mother with appropriate accommodations in her home, which is in a desirable residential community. She further agreed to provide accommodations not only for her mother, but also for one who would be in constant attendance to give the care that her mother requires. Plaintiff would also partake of meals with the family and be part of the family atomsphere.
>
> Since this is the factual situation presented the court concludes that the petitioner has disclosed no present need for assistance, in that, the assistance is readily available and forthcoming.
>
> Due to the apparent good faith offer of the respondent to accept her mother into her home and to care for her needs the question of whether the petitioner is in need of public assistance never really becomes an issue. That being so there is no need to resolve the question of whether the respondent ought to be made to support her mother and how much such support should be, nor is there occasion to consider what equitable steps ought to be taken should such a situation evolve with respect to enforcing contributions from all the adult children. (R. 165).

And the trial court further found that the appellee's sincere desire to provide for her mother was fully shared by appellee's husband who had consented to and approved of appellee's proposal to take her mother into their household "and to completely assume all responsibility for the support and maintenance" of her mother.[2] (R. 159, 160).

Pending her appeal to the District of Columbia Court of Appeals, appellant's testatrix died and appellant was there-

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1 District of Columbia Court of General Sessions, Domestic Relations Branch.

2 The mother was not at the time of trial and never had been a recipient of public assistance, nor had she ever applied therefor.

upon substituted as the executor of her estate. Appellee's motion thereafter filed to dismiss the appeal as moot was granted by the District of Columbia Court of Appeals on March 24, 1966 that court holding that the statute clearly contemplated an award of present and future support and "that any right the mother had under the statute ceased to exist at her death." (R. 241).

Although not apposite to this appeal, counsel for appellant has seen fit to discuss certain factual elements of this case in a way which is quite misleading. Accordingly, appellee feels constrained to reply to these misconceptions.

Thus, appellant charges appellee with having refused to contribute toward her mother's support even after her mother's funds were exhausted. The contrary is the truth of it. In fact, she had been at all times ready and willing to assume the major part of the expenses required to satisfy her mother's needs and indeed, if necessary, to assume all of such expenses. She asked only that she be allowed a voice in supervising her mother's care[3] (R. 98, 99-104) and otherwise that her mother be provided for in a manner that would be responsive to her mother's wishes and the advice of medical consultants. (R. 137, 149, 150).

Further, appellee did not, as appellant puts it, offer "assistance on condition that the testatrix be surrendered to her custody and appellee 'determine' both the 'nature and place' of her mother's 'care'." (Appellant's Brief, p. 3). The quoted words are taken entirely out of the context of the affidavit cited by appellant, upon a reading of the whole of which the appellee's concern with her

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[3] Appellee, Chief of the Health Economics Branch, Division of Community Health, of the United States Department of Health, Education and Welfare, has for fifteen years devoted herself in her professional endeavors to the improvement of health care for the aged and was the recipient of an honorary certificate for superior service in the achievement of comprehensive medical care benefits and of a federal focal point for health economics research and consultation. (R. 109, 110-111).

mother's circumstances and her devotion to relieving them in every way possible becomes evident.

Also, except for the objections filed by appellant's counsel to appellee's proposed findings submitted to the Trial Court, there is nothing in the record to show that the mother herself considered that the Trial Court's order would consummate a "forced transfer" and be against her best interests as appellant now states. (Appellant's Brief, p. 3).

STATUTES INVOLVED

D. C. Code § 3-215 (Supp. V, 1966). Public Assistance Not Assignable

> Public assistance awarded under this chapter shall not be transferable or assignable at law or in equity, and none of the money paid or payable to any recipient under this chapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law. (Oct. 15, 1962, 76 Stat. 917, Pub. L. 87-807, § 16.)

SUMMARY OF ARGUMENT

The only reasonable construction that may be given to the statute in question is the one pronounced by the District of Columbia Court of Appeals. It can hardly be said that a person's need for public assistance, which is an unqualified requisite of the statutory plan, is one that survives death. It necessarily follows that the Survival Act[4] cannot resuscitate an action which was intended only to benefit the living.

The Public Assistance Act itself (at D. C. Code § 3-215 Supp. V, 1966) acknowledges the personal nature of the action, in express language denying its benefits to all except the recipient of or the person in need of public assistance. Since the benefits are not assignable and are not subject

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[4] D. C. Code § 12-101 (Supp. V, 1966).

to any sort of levy even when awarded and paid, it cannot be seriously contended that they should become available to the heirs at law and next of kin, much less to the creditors of a deceased complainant where in the first place no award under the Act had been made. In this connection the District of Columbia Court of Appeals noted in its opinion that nothing can be found within the statutory plan which would require a child "to reimburse a private person for support already furnished." (R. 241).

The District of Columbia Survival Act does not stand inviolate. It has limitations that have been and are being judicially defined on a case by case basis. As the District of Columbia Court of Appeals held, that Act does not lend vitality to a statutory right that ceases to exist at death, in which posture the Survival Act is without application.

ARGUMENT

The Decision of the District of Columbia Court of Appeals That the Public Assistance Act Is Prospective Only in Its Operation and Effect Should Not Be Disturbed

There is no novelty in the ruling of the District of Columbia Court of Appeals that a statutory obligation of the kind here under discussion "does not arise until the court first determines the parent's need for support, the child's ability to furnish such support, and the extent to which such support should be furnished." (R. 241). Where there has been cause to rule on the point, other jurisdictions have been in accord.

In re Seeley's Estate, 268 Wis. 498, 67 N.W. 2d 836 (1955), involved a pauper's statute obliging a parent, spouse and child, so far as able, to maintain any dependent relative. In treating the statute as one "not self-executing" and as prospective in character, the court said:

> The obligation arises only after notice and hearing and when the court has made an order authorized by the statute; it is not complete until the court has found

> the necessity for aid, the ability of the relative or relatives sought to be charged, the amount required for the support of the indigent person, and has determined which of the relatives shall contribute, has prescribe the *proportion* each relative shall contribute and the date upon which payments should be made . . . .

268 Wis. at 500, 67 N.W.2d at 838.

Similarly, the Connecticut court in *Condon* v. *Pomeroy-Grace*, 73 Conn. 607, 48 Atl. 756 (1901), had occasion to interpret a statute requiring a child to support an indigent parent for the neglect of which duty the court was empowered to enter an order enforcing the child's contributions to such support. Relying upon a prior Connecticut case, the court reaffirmed the proposition:

> [T]hat the moral duty of a child to support a parent did not involve a legal liability, and that the statute created such liability only in cases within its terms, and that any legal liability created by the statute was, at most, potential and prospective, to be enforced when and not until the court had, upon the prescribed application, found 'not only the ability of the relations to support, but the manner and *proportion* in which they are to contribute.'

73 Conn. at 609, 48 Atl. at 758.

The Supreme Court of Nebraska has likewise viewed a widow's claim for statutory allowance for support and maintenance from her deceased husband's estate as abating upon the widow's death, despite a general survival statute reading "no action pending in any court shall abate by the death of either or both the parties thereto" (with certain enumerated exceptions not germane). *In re Sampson's Estate*, 142 Neb. 556, 7 N.W.2d 60 (1942).

Treating the widow's claim as purely a personal right, the Court said:

> [W]e are clearly of the opinion that the right to support was purely personal. From the very nature

> of the right it could be nothing more. It was a right which she alone could enjoy. Its duration depended upon her survival. There can be no support for a non-existing person.

Id. at 558, 559, 7 N.W.2d at 62, 63.

After considering with the greatest care decisions in sister states holding to the same effect, the Nebraska court concluded that it was "inevitable that the cause of action did not survive her [the widow's] death, and hence there is nothing to revive and [the survival statute] has no application." *Id.* at 561, 7 N.W.2d at 65.

And in *Creighton* v. *Pope County*, 386 Ill. 468, 54 N.E.2d 543 (1944), the Illinois court held that benefits, through accrued but unpaid, did not survive the death of the blind annuitant who had already satisfied the statutory requirements entitling him to benefits. With compelling rationale, the Illinois court held that the statute manifested a legislative intent to make payment to the beneficiaries themselves during life only and to no other person, the right of action being personal to the recipient and the survival statute having no applicability.

In the District of Columbia our case law has extracted from the Survival Act certain causes of action which terminate upon the death of a party. *Tillman* v. *Tillman*, 84 U.S. App. D.C. 171, 172 F.2d 270 (1948) held that a divorce suit, being purely personal in nature, is abated by the death of either party before judgment, citing with approval *Bailey* v. *Scott*, 57 App. D.C. 142, 18 F.2d 184, 185 (1927), stating that "this effect extends to whatever is identified with those [divorce] proceedings." Nor was the Survival Act[5]

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[5] D. C. Code § 12-101 (1940 ed.) then provided that:

> On the death of any person in whose favor or against whom a right of action may have accrued for any cause except an injury to the person or to the reputation, said right of action shall survive in favor of or against the legal representatives of the deceased; but no right of action for an injury to the person, except as provided in chapter forty-five of this Code, or to the reputation, shall so survive.

sufficient to revive the claim of an attorney who died pending an appeal from his disbarment. *Metzger* v. *O'Donoghue*, 53 App. D.C. 107, 288 Fed. 461 (1923). See also *Dingman* v. *Henry*, 51 App. D.C. 339, 279 Fed. 795 (1922).

Most recently this court held that our current Survival Act did not apply to a suit for partition of a joint tenancy after the death of a joint tenant. *Cobb* v. *Gilmer*, — U.S. App. D.C. —, 365 F.2d 931 (1966). With reasoning analogous to the tenets of appellee's position, Judge Holtzoff held in *In re Estate of Isabel N. Jones*, Administration No. 117893 (Memorandum Opinion, Oct. 26, 1966) that the family allowance granted by D. C. Code § 19-101(a) (Supp. V, 1966)[6] is defeated upon the death of the surviving spouse prior to the payment of the allowance. As Judge Holtzoff put it, "No object is served by permitting it [the family allowance] to go to the next of kin of a surviving spouse."

Even the appellant admits that the decisions of this court in *Beach* v. *Government of the District of Columbia*, 116 U.S. App. D.C. 68, 320 F.2d 790 (1963), *cert. denied*, 375 U.S. 943, and *Harris* v. *District of Columbia*, — U.S. App. D.C. —, 357 F.2d 593, are distinguishable and in nowise dispositive of the instant case. Both of those cases were brought under different statutory framework and were concerned with the liability of a parent or his estate for the care and maintenance furnished by the District of Columbia to a child who had been committed to St. Elizabeths Hospital. Involved there were liquidated amounts which had already accrued by reason of care in the past provided by the District of Columbia to the child in question. In the case at bar, however, the District of Columbia was neither a party nor had it provided public assistance to the mother as a public charge. Surely it cannot be said

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[6] "Upon the death of a person leaving a surviving spouse, the spouse is entitled to an allowance out of the personal estate of the decedent of the sum of $500 for the personal use of himself and of minor children. . . ."

that any liability has accrued here by reason of monies or other assistance privately furnished by the children to supplement their mother's income.

And petitioner's reliance upon *Hudson* v. *Lazarus*, 95 U.S. App. D.C. 16, 217 F.2d 344 (1944) is misplaced. As discussed above, decisional law in the District of Columbia has emphasized that our Survival Statute is not an omnibus enactment under which any action survives the death of a party regardless of its nature.

This principle is well stated at 1 Am.Jur.2d, *Abatement, Survival and Revival*, § 54 (1962) as follows:

> Certain actions or proceedings, by their nature, are rendered useless as a practical matter by the death of a party, and may abate, regardless of a general survival statute.

Ibid.

The assistance to which a person may be entitled under the District of Columbia Public Assistance Act is personal to the applicant. It is not transferable or assignable, it is not subject to legal process nor to the bankruptcy or insolvency laws. The intent of Congress is therefore manifest that the Act was not to benefit any person other than a recipient of or a person in need of assistance and that the claim of appellant's testatrix, therefore, expired upon her death.[7]

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[7] Appellant advances the philosophy that by its enactment of the Assistance Act of 1962 Congress "took a long and important stride forward" in the field of welfare legislation by placing responsibility for the support of indigents upon their close relatives, including adult children. (Appellant's Brief, p. 9). However that may be, later and perhaps with more scrutiny of the impact of such legislation on present day social structures, Congress took the different view that only a spouse or a parent of a minor child or of a blind child or of a disabled child should be considered a responsible individual within the meaning of the Social Security Amendments of 1965. See Act of July 30, 1965, § 1902(a)(17), 79 Stat. 344, 42 U.S.C. § 1396(a)(17). In determining that a child should not be a responsible individual for the pur-

CONCLUSION

Wherefore, for the foregoing reasons appellee respectfully submits that the judgment of the District of Columbia Court of Appeals dismissing the appellant's appeal should be affirmed.

Respectfully submitted,

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pose of determining whether his parent qualified for public assistance the Senate Report accompanying the 1965 amendments recites:

> The committee has heard of hardships on certain individuals by requiring them to provide support and to pay for the medical care needed by relatives. The committee believes it is proper to expect spouses to support each other and parents to be held accountable for the support of their minor children. . . . Such requirements for support may reasonably include the payment by such relative, if able, for medical care. *Beyond such degree of relationship, however, requirements imposed are often destructive and harmful to the relationships among members of the family group.* Thus, states may not include in their plans provisions for requiring contributions from relatives other than a spouse or the parent of a minor child. . . . Any contributions actually made by relatives or friends, or from other sources, will be taken into account by the state in determining whether the individual applying for medical assistance is, in fact, in need of such assistance. (Emphasis added.)

S. Rep. No. 404, Pt. I, 89th Cong., 1st Sess. 78 (1965).

It may be parenthetically stated that the instant case is an example of the unfortunate harm to family relaionships perceived by Congress to occur as a result of support responsibilities imposed beyond the degrees and the circumstances included in the ameliatory amendments to the Social Security Act.